

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte JAMES P. LYNCH

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Appeal No. 2004-0350  
Application No. 09/570,507

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ON BRIEF

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Before GARRIS, PAK, and TIMM, Administrative Patent Judges.  
GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the final rejection of claims 1-3, 5-11, and 14-16 which are all of the claims remaining in the application.

The subject matter on appeal relates to a recreational apparatus or game which comprises a base, a ladder fabricated from horizontal rungs and vertical struts which are interconnected with couplers, and a projectile having a flaccid spacer with massive terminators at either end, whereby the projectile may be tossed

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to said ladder and wrapped thereabout. Further details of this appealed subject matter are set forth in the appealed independent claims which are claims 1, 10, 14 and 15. A copy of these claims, taken from the Appellant's brief, is appended to this decision.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Hailer et al. (Hailer)	4,932,657	June 12, 1990
Kraushaar	5,165,694	Nov. 24, 1992
Schmidt	5,539,957	July 30, 1996

Claims 1-3, 5-11 and 14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Kraushaar in view of Hailer, and claims 15 and 16 stand correspondingly rejected over these references and further in view of Schmidt.<sup>1</sup>

We refer to the brief and reply brief<sup>2</sup> and to the answer for

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<sup>1</sup> On page 5 of the brief, the Appellant has identified three separate claim groupings, namely, (1) claims 1-3 and 5-11, (2) claim 14 and (3) claims 15 and 16. Accordingly, in our assessment of the above noted rejections, we will focus on the independent claims in these respective claim groupings with respect to which the dependent claims will stand or fall. See 37 CFR § 1.192(c)(7) (2002).

<sup>2</sup> Via paper no. 21, the Examiner has indicated that the reply brief has been entered and considered but that the documents submitted therewith as secondary evidence have not been entered. It follows that we have not considered these non-entered documents in our disposition of this appeal.

a complete exposition of the opposing viewpoints expressed by the Appellant and the Examiner concerning these rejections.

#### OPINION

For the reasons which follow, we will sustain the Examiner's rejection of claims 1-3, 5-11 and 14 but not his rejection of claims 15 and 16.

Relative to the game apparatus of Kraushaar, appealed independent claims 1, 10 and 14 share a common distinction in that they require a ladder or target fabricated from tubular material such as horizontal rungs and vertical struts interconnected with couplers therefor. In contrast, patentee's game apparatus is fabricated from horizontal rungs which are supported by vertical walls. However, we conclude that it would have been obvious for one having ordinary skill in the art to fabricate Kraushaar's apparatus with tubular material to thereby form a base and ladder having horizontal rungs and vertical struts interconnected with couplers in accordance with the teachings of Hailer (e.g., see Figure 1 and the disclosure relating thereto including lines 7-35 in column 3). The so-fabricated apparatus of Kraushaar would thereby possess the benefits of being easily broken down,

transported and set up as taught by Hailer (e.g., see lines 6-9 in column 2 and the paragraph bridging columns 2 and 3).

It is the Appellant's position that an artisan would not have possessed the level of skill necessary to combine the teachings of Kraushaar and Hailer in the manner discussed above. We find no persuasive merit in this position, however, since it is contraindicated by the Hailer disclosure which is specifically directed to an artisan with an ordinary level of skill and which is specifically concerned with fabricating a game apparatus from tubular materials. We are also unconvinced by the Appellant's argument that the combination proposed above is contrary to Kraushaar and other prior art of record which illustrate that, in games involving tossing devices, "targets were thought by those in the art to be massive in order to remain stationary and survive repeated impacts from a weighted projectile" (brief, page 16). Again, the Hailer reference contraindicates this argument since the tubular-fabricated apparatus thereof is used in conjunction with thrown, hit or kicked balls such as baseballs, footballs and soccer balls (e.g., see lines 5-13 in column 1).

With respect to appealed independent claim 1 specifically, the Appellant further argues that the applied prior art contains

no teaching or suggestion of a projectile having the here claimed feature concerning flaccid spacer length. This argument, which is also applicable to appealed independent claim 10, is not well taken. Kraushaar explicitly teaches that his web member, which reads on the Appellant's claimed flaccid spacer, "is provided with a sufficient length so that when caught on a cross bar it can wrap around one or two cross bars at the same time" (column 2, lines 4-7; emphasis added). A web member length which is sufficient to wrap around two cross bars at the same time would correspond to the flaccid spacer length defined by the independent claims under consideration.

The additional argument concerning appealed independent claim 14 relates to the requirement that the horizontal rungs each individually possesses a length twice that of the respective vertical struts. Because the length of these vertical struts defines the spacing between the horizontal rungs, the claim feature under consideration involves the parameter of horizontal rung length relative to vertical spacing between the rungs.

Significantly, Kraushaar evinces that the parameter of rung-length relative to the spacing between rungs is recognized in this game art as a result-effective variable (e.g., see Figure 1 in comparison with Figure 5 and the respective disclosures relating

thereto). It is well settled that, generally speaking, it would have been obvious for an artisan with ordinary skill to develop workable or even optimum values for such result-effective parameters. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (Fed. Cir. 1990); In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980); In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). We conclude, therefore, that it would have been obvious for the artisan to provide the Kraushaar apparatus, as modified above, with workable values for the parameter under consideration including those wherein the horizontal rungs are each individually twice the length of the respective vertical struts as required by claim 14.

In light of the foregoing, it is our ultimate determination that the Kraushaar and Hailer references establish a prima facie case of obviousness with respect to independent claims 1, 10 and 14 which the Appellant has failed to successfully rebut with argument and/or evidence of nonobviousness. See In re Oetiker, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). As a consequence, we hereby sustain the section 103 rejection of claims 1-3, 5-11 and 14 as being obvious over Kraushaar in view of Hailer.

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We reach a different conclusion regarding the section 103 rejection of claims 15 and 16 as being unpatentable over Kraushaar in view of Hailer and further in view of Schmidt. As presented in the answer, this rejection does not include a discussion of the Schmidt reference. However, in the Office action mailed April 23, 2002 as paper no. 14, the Examiner expresses his obviousness conclusion in the following manner:

Regarding claim 15, although the Hailer base does not have pivoting legs, it would have been an obvious matter of design choice to substitute pivoting legs for the Kraushaar game as modified above since it has generally been recognized that the concept of making elements adjustable involves only routine skill in the art. Moreover, it would have been obvious to provide pivoting legs in view of Schmidt who shows in Figures 4 and 5 that it is old and well-known in the art to collapse a base by using pivotally attaching tubular members to make the target more easily stored.

The Examiner's conclusion of obviousness lacks persuasive merit. Of the prior art here applied by the Examiner, only the Schmidt reference contains any teaching or suggestion relating to a pivot feature of any kind. However, the Examiner does not identify and we do not independently perceive any disclosure in this reference which would have suggested providing the modified Kraushaar apparatus discussed above with couplers which pivotally

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attach the horizontally extending legs to the ladder so as to permit the perpendicular to parallel pivoting movement required by independent claim 15. While Schmidt may show a coupler which pivotally attaches a horizontal leg to a vertical tubular member (e.g., see elements 39, 17 and 19 in Figure 1), this coupler is completely different from and not substitutable for the coupler which attaches Hailer's horizontal leg 21 to the vertical frame sections 19 of his target frame 14.

Viewed from this perspective, it seems clear that the rejection under review is based upon impermissible hindsight wherein that which is taught only by the inventor is used against its teacher. W.L. Gore & Assocs. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert denied, 469 U.S. 851 (1984). We cannot sustain, therefore, the Examiner's § 103 rejection of claims 15 and 16 as being unpatentable over Kraushaar in view of Hailer and further in view of Schmidt.

The decision of the Examiner is affirmed-in-part.



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No time period for taking any subsequent action in connection  
with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
CHUNG K. PAK	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
CATHERINE TIMM	)	
Administrative Patent Judge	)	

BRG/jrg

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APPENDIX

1. A recreational apparatus which enables participation by diverse persons of all skill levels and which encourages interpersonal communications and personal development, and which further may be disassembled to be stored compactly and re-assembled quickly, and which is resistant to the exterior environment, comprising:

a base for providing structural support upon a surface;

a ladder extending vertically therefrom fabricated from a lightweight, rigid, resilient tubular material, having first and second horizontal rungs and first, second, third and fourth vertical struts, said vertical struts having a first length;

a first coupler retaining said first and second vertical struts to a first end of said first horizontal rung;

a second coupler retaining said third and fourth vertical struts to a second end of said first horizontal rung distal to said first end of said first horizontal rung;

a third coupler retaining said second vertical strut to a first end of said second horizontal rung;

a fourth coupler retaining said fourth vertical strut to a second end of said second horizontal rung distal to said first end of said second horizontal rung;

said first, second, third and fourth couplers coupling either permanently or removably;

and

a projectile having a flaccid spacer equal to the length of said first and second vertical struts in combination and massive terminators at either end of said flaccid spacer,

whereby said projectile may be tossed to said ladder and subsequently wrapped thereabout.

10. A game having an aerial projectile and a target, said aerial projectile formed of two massive ends and a flaccid connector therebetween, wherein the improvement comprises:

at least two primarily horizontal rungs within said target able to support said aerial projectile thereon, said rungs terminated at both ends with primarily vertical supports and spaced from each other by a first predetermined distance;

said target comprised entirely of tubular and resilient material which is simultaneously light weight, weather resistant, and of low aerodynamic cross-section, to subsequently withstand the rigors of weather including high winds; and

said flaccid connector having a length twice said first predetermined distance.

14. A recreational apparatus which enables participation by diverse persons of all skill levels and which encourages interpersonal communications and personal development, and which further may be disassembled to be stored compactly and re-assembled quickly, and which is resistant to the exterior environment, comprising:

a base for providing structural support upon a surface;

a ladder extending vertically therefrom fabricated from a lightweight, rigid, resilient tubular material, having first and second horizontal rungs and first, second, third and fourth vertical struts having a first length, said first and second horizontal rungs each individually twice said first length;

a first coupler retaining said first and second vertical struts to a first end of said first horizontal rung;

a second coupler retaining said third and fourth vertical struts to a second end of said first horizontal rung distal to said first end of said first horizontal rung;

a third coupler retaining said second vertical strut to a first end of said second horizontal rung;

a fourth coupler retaining said fourth vertical strut to a second end of said second horizontal rung distal to said first end of said second horizontal rung;

said first, second, third and fourth couplers coupling either permanently or removably; and

a projectile having a flaccid spacer and massive terminators at either end of said flaccid spacer,

whereby said projectile may be tossed to said ladder and subsequently wrapped thereabout.

15. A recreational apparatus which enables participation by diverse persons of all skill levels and which encourages interpersonal communications and personal development, and which further may be disassembled to be stored compactly and re-assembled quickly, and which is resistant to the exterior environment, comprising:

a base comprising first and second horizontally extending legs, said first and second legs extending parallel in an operative position for providing structural support upon a surface;

a ladder extending vertically therefrom fabricated from a lightweight, rigid, resilient tubular material, having first and second horizontal rungs and first, second, third and fourth vertical struts;

a first coupler retaining said first and second vertical struts to a first end of said first horizontal rung;

a second coupler retaining said third and fourth vertical struts to a second end of said first horizontal rung distal to said first end of said first horizontal rung;

a third coupler retaining said second vertical strut to a first end of said second horizontal rung;

a fourth coupler retaining said fourth vertical strut to a second end of said second horizontal rung distal to said first end of said second horizontal rung;

said first, second, third and fourth couplers coupling either permanently or removably;

fifth and sixth couplers respectively pivotally attaching said first and second horizontally extending legs to said ladder wherein said first and second horizontally extending legs are pivotal from generally perpendicular to said ladder in said operative position to parallel to said ladder for storage; and

a projectile having a flaccid spacer and massive terminators at either end of said flaccid spacer,

whereby said projectile may be tossed to said ladder and subsequently wrapped thereabout.

